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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-134

MRS. BILLIE MCCLURE,

Petitioner,

v.

THE SALVATION ARMY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE NATIONAL HEADQUARTERS OF THE SALVATION ARMY AS *AMICUS CURIAE* IN OPPOSITION

INTEREST OF *AMICUS CURIAE*

The Salvation Army is an international religious denomination, a church of the Christian faith, organized and operated on a military pattern, with its own body of religious doctrine, its own ministers of the Gospel (referred to as "Officers") and its own church members (referred to as "soldiers"). Its churches (referred to as "corps") within the United States are organized on a geographic basis into four Territories. Respondent herein, The Salvation Army,

a Georgia corporation, is the legal entity through which the affairs of the Southern Territory of The Salvation Army are conducted. The supervision and coordination of all activities of The Salvation Army in the United States is the responsibility of the National Headquarters of The Salvation Army, this *amicus curiae*.

Since the issues involved in this case are of vital significance to the relationship between The Salvation Army and its clergy, 3,800 Officers serving throughout the United States, the National Headquarters of The Salvation Army requested the consent of the parties to the filing of this brief *amicus curiae*. A letter from each of the parties evidencing such consent was filed with the Clerk of this Court simultaneously with the filing of this brief.

OPINIONS BELOW

The citations to the opinions below are fully set forth in the Brief of Respondent in Opposition.

JURISDICTION

For the reasons set forth in the Brief of Respondent in Opposition, this *amicus curiae* submits that the untimely filing of the Petition deprived this Court of jurisdiction to grant a writ of certiorari in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution which, in pertinent part, provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof • • •."

Also involved are certain provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* As amended by the Equal Employment Opportunity Act of 1972, those provisions of Title VII which are pertinent to the issues discussed in this brief *amicus curiae* are

(1) Section 701(b), 42 U.S.C. § 2000e(b):

"The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year, and any agent of such a person * * *."

(2) Section 701(f), 42 U.S.C. § 2000e(f):

"The term 'employee' means an individual employed by an employer * * *."

(3) Section 702, 42 U.S.C. § 2000e-1:

"This subchapter shall not apply to * * * a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities."

(4) Section 703(a), 42 U.S.C. § 2000e-2(a):

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

(5) Section 704(a), 42 U.S.C. § 2000e-3(a):

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment * * * because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

QUESTIONS PRESENTED

The questions presented in this case are:

1. Whether the Religion Clauses of the First Amendment to the United States Constitution prohibit the application of the equal employment opportunity provisions of Title VII of the Civil Rights Act of 1964 to the relationship between a church and its ministers.

2. If so, whether Title VII of the Civil Rights Act of 1964 can be construed so as to avoid the constitutional question.

STATEMENT

Only three facts, as found by the District Court (Petitioner's Appendix A. 2a-5a), accepted by the Court of Appeals (Pet. App. A. 9a) and conceded by petitioner (Pet. App. A. 5a & 13a), are essential to a resolution of the issues raised in this case:

1. The Salvation Army is a church.
2. As a Salvation Army Officer, petitioner was a duly commissioned minister of that church.
3. Throughout her entire employment relationship with The Salvation Army, petitioner was performing the duties and functions of a minister of the Gospel.

On July 15, 1970, shortly after being advised that her officership in The Salvation Army was being terminated for unsatisfactory service, petitioner commenced a civil action against The Salvation Army in the United States District Court for the Northern District of Georgia, alleging that it had engaged in discriminatory employment practices against her in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

The complaint alleged that petitioner had been denied certain allowances and other benefits given to male Salvation Army Officers and that female Salvation Army Officers generally do not receive comparable assignments, allowances and other benefits. The relief sought by petitioner was reinstatement, an injunction against further discrimination and a judgment for the alleged difference between the compensation paid to male Salvation Army "employees" whose responsibilities were equivalent to those performed by petitioner and the compensation paid to her.

The Salvation Army moved to dismiss the complaint for want of jurisdiction on the grounds (1) that it was neither an "employer" nor a person engaged in an "industry affecting commerce" within the meaning of Section 701(b) and (h) of the Act, 42 U.S.C. § 2000e(b) & (h), and (2) that, since it is a "religious corporation" for which the petitioner had voluntarily agreed to perform "work connected with the carrying on by such corporation * * * of its religious activities", it was not subject to the provisions of Title VII of the Act by reason of Section 702 thereof, 42 U.S.C. § 2000e-1.

In addition to its motion to dismiss the complaint, The Salvation Army filed an answer asserting, *inter alia*, that, since it is a church, application of the provisions of Title VII of the Act to it under the circumstances of this case would constitute a violation of the First Amendment to the United States Constitution.

After discussing a number of First Amendment cases, the District Court concluded that "any allowance, salary, or funds received by * * * [Salvation Army] Officers, their work assignments or their places of assignment, among any other grievances Mrs. McClure may have, are matters of religious activity into which the Court may not inquire under prior decisions and * * * [Section 702 of the Act]" (Pet. App. A. 7a). The District Court then granted respondent's motion to dismiss the complaint, holding that The Salvation Army is a "religion" and that petitioner's work was "connected with [the] carrying on of the religious activities of The Salvation Army" within the meaning of Section 702 of the Act (Pet. App. A. 5a & 8a).

On appeal, the United States Court of Appeals for the Fifth Circuit unanimously affirmed the order of the District Court, but on different grounds. The Court of Appeals found that The Salvation Army is an "employer" engaged in an "industry affecting commerce" within the meaning of Section 701(b) and (h) of the Act (Pet. App. A. 15a-16a), that petitioner was an "employee" of The Salvation Army within the meaning of Section 701(f) of the Act, 42 U.S.C. § 2000e(f) (Pet. App. A. 17a), and that Section 702 of the Act did not exempt The Salvation Army and other religious organizations from liability for discriminating against their employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment (Pet. App. A. 18a).

The Court of Appeals then considered the question of whether the application of the provisions of Title VII of the Act to the relationship between The Salvation Army, a church, and petitioner, one of its ministers, would violate either of the Religion Clauses of the First Amendment

(Pet. App. A. 19a). After carefully reviewing the applicable decisions of this Court, the Court of Appeals concluded that the application of Title VII to the relationship between The Salvation Army and its Officers "would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment" (Pet. App. A. 24a-25a).

Now faced with the choice of declaring Title VII of the Act unconstitutional or of construing Title VII in such a manner as to avoid the constitutional infirmity, the Court of Appeals held that "Congress did not intend, through the non-specific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister" (Pet. App. A. 25a).

Petitioner has asked that a writ of certiorari be granted by this Court to review this decision.

ARGUMENT

I.

Certiorari Is Not Warranted in This Case

This case arises on respondent's motion to dismiss petitioner's complaint for want of jurisdiction. Petitioner argued and lost the motion in the District Court and took an appeal to the Court of Appeals. There, the very points now being raised by petitioner were exhaustively briefed not only by petitioner and respondent but also by the Equal Employment Opportunity Commission and the National Headquarters of The Salvation Army as *amici curiae*. In a long, well-reasoned opinion, the Court of Appeals unanimously affirmed the order of the District Court. Petitioner now asks this Court to review that ruling. But, as Mr. Chief Justice Taft observed, "The jurisdiction

[of the Supreme Court to bring up cases by certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co.* v. *Coty,* 262 U.S. 159, 163 (1923).

With respect to the grounds for the granting of a petition for a writ of certiorari, Rule 19[1] of the Revised Rules of the Supreme Court of the United States provides, in part:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor * * *."

Are there "special and important reasons" for granting certiorari in this case?

Petitioner asserts that this case involves the constitutionality of an important federal statute and contends that this question "should be settled by this Court" (Pet. 14). While the specific issue raised by this case, the constitutionality of Title VII as it relates to the relationship between The Salvation Army and its Officers, has never been tested in this Court, the broad principle involved, the protection of the relationship between a church and its clergymen against governmental interference on First Amendment grounds, has been considered by this Court many times. Where, as here, the issue was resolved by the Court of Appeals in a manner completely consistent with the applicable decisions of this Court and in such a way as to preserve the constitutionality of the federal statute in question, there is no need for this Court to grant certiorari.

Despite petitioner's attempt to expand the holding of the Court of Appeals, the issue involved in this case is a narrow one: whether the equal employment opportunity provisions of Title VII may be applied in the relationship between a church and its ministers without violating the Religion Clauses of the First Amendment. Petitioner, on the other hand, describes the "critical question" to

be resolved by this Court as "whether the First Amendment gives a license to churches and other religious organizations to engage in racial, sexual, or national origin discrimination against their employees" and asserts that "the effect of the decision below is to leave thousands of employees of religious organizations uncertain of whether they are or are not protected by the equal employment opportunity statutes" (Pet. 14). In making such statements, however, petitioner conveniently chooses to disregard the District Court's finding which emphasized the important distinction between The Salvation Army's Officers, who are all duly commissioned ministers of the Gospel, and its other employees:

> "There is also a classification known as 'employees,' of which there are approximately 3,000 in the Southern Territory. Employees may be of any race, any background, any origin and they generally bring with them certain needed skills, ranging from doctors to laborers, but they are never commissioned officers of the Army" (Pet. App. A. 3a).

This distinction was also recognized by the Court of Appeals which stated that it was "restricting our decision to the church-minister relationship and expressly refraining from any decision as to other church employees of a type not involved in this controversy * * *" (Pet. App. A. 10a).

Despite petitioner's suggestions to the contrary (Pet. 11), the question of whether The Salvation Army followed its own procedures and accorded petitioner "due process" before discharging her is not before this Court. Moreover, petitioner's contention that certiorari should be granted to review the applicability of the retaliatory discharge provisions of Section 704(a) of the Civil Rights Act, 42 U.S.C. §2000e-3(a), "even if the Salvation Army's status as a church exempted it from the §703 claim of sex discrimination" (Pet. 23), ignores the fact that Section 704(a) of

the Act, like Section 703, cannot be invoked unless it is determined that clergymen are "employees" covered by Title VII. Thus, the Section 704(a) question raised by petitioner affords no independent basis for review.

Since the question of federal law involved in this case is simply whether the application of Title VII to clergymen violates the First Amendment, and since this question was decided by a unanimous Court of Appeals in a manner completely consistent with the applicable precedents of this Court and in such a way as to uphold the constitutionality of Title VII, certiorari is not warranted in this case.

II.

The Decision Below Is Clearly Correct

The Salvation Army's Officers, all duly commissioned ministers of the Gospel, are the very core of The Salvation Army. As the Court of Appeals correctly pointed out (Pet. App. A. 24a), if the EEOC, through Title VII of the Civil Rights Act, were permitted to inject itself into such matters as the "compensation, terms, conditions or privileges of employment" of Salvation Army Officers, it would constitute a direct interference with the manner in which The Salvation Army fulfills its religious mission. Such interference would clearly violate the First Amendment.

The intent of the First Amendment, said Thomas Jefferson shortly after its adoption, was to erect "a wall of separation between church and state." *Reynolds* v. *United States*, 98 U.S. 145, 164 (1878). Except in those rare cases where "grave and immediate danger" is threatened, *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 639 (1943), this Court has consistently held that the "wall must be kept high and impregnable", *Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947), that, in enjoining interference of the government in affairs of religion, "the prohibition is absolute", *Zorach* v. *Clauson*, 343 U.S. 306, 312 (1952), and that in matters of religion, "no official, high or petty, can prescribe what shall be

orthodox", *West Virginia State Board of Education* v. *Barnette, supra,* 319 U.S. at 642.

In its decision, the Court of Appeals gave careful consideration to the applicable precedents of this Court, *Watson* v. *Jones,* 13 Wall. 679 (1871), *Gonzalez* v. *Roman Catholic Archbishop,* 280 U.S. 1 (1929), *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94 (1952), *Kreshik* v. *St. Nicholas Cathedral,* 363 U.S. 190 (1960) (per curiam) and *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440 (1969).

As the Court of Appeals recognized, these cases stand for the proposition that matters of church government and administration, including ecclesiastical rules, customs, laws and practices, as well as those of faith and doctrine, are beyond the purview of civil authorities. *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church, supra,* 393 U.S. at 449; *Kedroff* v. *St. Nicholas Cathedral, supra,* 344 U.S. at 107-08, 116; *Watson* v. *Jones, supra,* 13 Wall. at 727. These are "matters at the very core of a religion" and are thus protected against governmental infringement by the First Amendment. *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church, supra,* 393 U.S. at 450. Where no improper methods are shown, the right of a church to determine the essential qualifications of, select, assign, discipline and discharge its clergymen is also protected by the Free Exercise Clause of the First Amendment. *Kedroff* v. *St. Nicholas Cathedral, supra,* 344 U.S. at 107-08, 116. *Cf. Gonzalez* v. *Roman Catholic Archbishop, supra,* 280 U.S. at 16. It therefore follows that legislation which attempts to regulate matters of church government or the relationship between a church and its ministers is an unconstitutional instrusion of governmental power into "the forbidden area of reli-

gious freedom". *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. at 107-08, 119.

As with any other religious denomination, the relationship between The Salvation Army and its Officers, its ministers of the Gospel, is of the greatest importance, underlying the very organization and the disciplines of The Salvation Army and its effectiveness in performing its particular religious and charitable functions. Surely this relationship is one of those "matters at the very core of a religion" which the Free Exercise Clause was designed to protect. Moreover, the constitutional right of The Salvation Army to select and dismiss its Officers certainly carries with it the concomitant right to fix the terms of its relationship with its Officers and the conditions under which they pursue their ministry.

It is important to note that the operative provision of Title VII, Section 703(a), covers not only the relatively simple matter of discrimination in compensation (e.g., salaries, bonuses, etc.) but also the much more complex and difficult areas of discrimination in the "terms, conditions, or privileges of employment". No matter what the basis of discrimination, can the federal government, through the EEOC or otherwise, dictate the terms of a minister's calling? Is the EEOC going to be permitted to investigate a Salvation Army Officer's hours, place of assignment, type of activity assigned or the number of hardships he must undergo in order to fulfill his religious mission? Would it be consistent with the First Amendment to permit the EEOC to entertain a complaint from a Roman Catholic nun that her quarters were not every bit as commodious as those of the parish priest? If unrestrained by the First Amendment, Section 703(a) of the Civil Rights Act, like the tentacles of an octopus, would reach so deeply into the

intimate relationship of the church and its ministers that it would strangle or at least seriously disrupt the most basic function of a minister, the spreading of the Gospel.

Petitioner argues, however, that the Court of Appeals has misinterpreted the test set forth by this Court with respect to the applicability of the Free Exercise Clause:

> "This is not a case where a church, or one or more of its adherents, are aggrieved by a statute which imposes a burden on the exercise of religious beliefs or practices. * * *" (Pet. 14)

Yet the cases discussed above clearly stand for the proposition that governmental interference with the right of a church to establish the qualifications of, select, assign, discipline and discharge its clergymen violates the Free Exercise Clause just as surely as a government regulation forbidding a religious denomination from practicing its religion.

Petitioner then asserts:

> "Nor is there any claim made that the religious tenets of The Salvation Army authorize or require the unequal treatment of women. On the contrary, Salvation Army doctrine requires equal treatment of women. * * *" (Pet. 15)

Petitioner has attempted to interpret Salvation Army doctrine in such a way as to make it appear to be consistent with the objectives of Title VII with respect to discrimination based on sex and would therefor invoke the aid of the federal courts to enforce her interpretation of The Salvation Army's doctrine in this regard. However, even if petitioner's interpretation were correct, it must be remembered that Title VII could not be applied to The Salvation Army and its Officers for the purpose of remedying this form of alleged discrimination without necessarily subjecting The Salvation Army to the provisions of Title

VII for all other purposes as well, and there is no showing on this record as to what The Salvation Army's doctrines may prescribe with respect to the race, color or national origin of its Officers. If its doctrine requires that male and female Officers be treated equally, The Salvation Army is certainly to be commended. And if its doctrine in this respect seems to be consistent with the objectives of Title VII of the Civil Rights Act, all the better. However, this does not give Congress the right, through the EEOC or otherwise, to inject itself into this constitutionally protected area for the purpose of attempting to determine whether The Salvation Army or any other church is in fact adhering to its doctrines, tenets or practices with respect to its clergy.

In support of her view that Title VII may be applied to the church-minister relationship without violating the Free Exercise Clause, petitioner cites *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir. 1954), *cert. denied*, 347 U.S. 1013 (1954) (involving the application of the Fair Labor Standards Act to non-minister employees of a religious organization who worked in the production, printing, handling, addressing and distributing of the printed materials issued by the organization); *Cap Santa Vue, Inc.* v. *NLRB*, 424 F.2d 883 (D.C. Cir. 1970) (involving the application of the National Labor Relations Act to non-minister employees of convalescent homes operated by a religious organization); *Parker* v. *Commissioner of Internal Revenue*, 365 F.2d 792 (8th Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967) (involving the application of the tax exemption for religious organizations provided in Section 501 of the Internal Revenue Code of 1954 to the "Foundation For Divine Meditation"); *Church of Scientology of California* v. *Richardson*, 437 F.2d 214 (9th Cir. 1971) (involving the application of the Federal Food, Drug and Cosmetic Act to the importation of electrical devices known as

"E-meters" used in the practice of "Scientology"); and *United States* v. *Kuch*, 288 F. Supp. 439 (D.D.C. 1968) (involving the question of whether a self-proclaimed "minister" of the "Neo-American Church" who asserted that her "religious beliefs" required her to take psychedelic drugs could be indicted for posssession of LSD).

Petitioner then criticizes the Court of Appeals for failing to make "any analysis of these cases and the doctrines which they reflect * * *" (Pet. 17). However, in not one of these cases was the constitutionally protected relationship between a church and its ministers involved. Since none of these cases is helpful in answering the question presented in this case, the failure of the Court of Appeals to consider them is understandable.

Petitioner also contends that the Court of Appeals "misapplied" the test laid down by this Court in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), for determining whether there has been an impermissible infringement of the free exercise of religion (Pet. 18). Step one of the *Sherbert* test is a determination of whether the state action imposes a burden on the free exercise of religion. Petitioner asserts that this step is not satisfied because "there is no visible infringement of religious liberty" (Pet. 18). Yet this Court has repeatedly held that governmental interference with the right of a church to establish the qualifications of, select, assign, discipline and discharge its clergy in a way allegedly mandated by Section 703(a) of the Act clearly violates the Free Exercise Clause, and the Court of Appeals so recognized (Pet. App. A. 20a-24a). The second step involves a determination of whether some "compelling state interest" sought to be achieved justifies the infringement of the free exercise right and here this Court warned: "[I]n this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for

permissible limitation' [footnote omitted]." *Sherbert* v. *Verner, supra,* 374 U.S. at 406. Petitioner argues that "the governmental interest in eradicating invidious discrimination based on sex, race or national origin * * * is no less than *compelling* * * * " (Pet. 18) (emphasis in original). But is this interest just as "compelling" when applied to clergymen and members of religious orders? Can we say that the refusal of the Roman Catholic Church to admit women to the priesthood is the type of "grave abuse" which Title VII was intended to remedy? Is there a "compelling state interest" in securing equal pay scales for priests and nuns? Will the intent of Title VII be seriously frustrated if these and similar objectives are not achieved? Although the Court of Appeals did not deny that there is a strong public policy against discriminatory employment practices, it correctly recognized that this policy must give way when the relationship between a church and its ministers is involved.

A similar clash between a "compelling state interest" and the free exercise of religion was faced by this Court in *Wisconsin* v. *Yoder,* 92 S. Ct. 1526 (1972). In that case, the respondents, Amish parents who believed that their children's attendance at high school, public or private, was contrary to their religion and way of life, were convicted for violating Wisconsin's compulsory school attendance law when they refused to send their children to school beyond the eighth grade. This Court recognized that a state's obligation to provide children with an education was a "paramount responsibility" and one which ranked "at the very apex of the function of a State". *Id.* at 1532. Nevertheless, in holding that the state could not compel these parents to send their children to high school, this Court said:

> "Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on other fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First

> Amendment and the traditional interest of parents with respect to the religious upbringing of their children • • • ." *Id.*

Surely the right of a church to select, assign and discipline its ministers is an even greater "fundamental right and interest" which must be protected by the Free Exercise Clause. While equal employment opportunity is certainly a desirable objective, as this Court has observed: "The values underlying • • • [the Religion Clauses] have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance." *Id.* at 1533.

Petitioner has urged this Court to grant certiorari to "settle the question in a manner which will safeguard equal employment opportunity without in any way damaging religious liberty" (Pet. 19). Unfortunately, such an accommodation is not possible in this case. We are faced with a clash between the laudible objectives of Congress in enacting Title VII and the constitutionally protected right to the free exercise of religion. Under such circumstances, the Court of Appeals was clearly correct in holding that the former must yield to the latter.

Although the Court of Appeals chose to base its decision on the Free Exercise Clause, it could have reached the same result by applying "the independent measure of constitutionality" under the Religion Clauses described as the "entanglement" test. *Tilton* v. *Richardson*, 403 U.S. 672, 685 (1971).

The "entanglement" test was first articulated by this Court in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970). Since then, it has been applied or referred to in *Gillette* v. *United States*, 401 U.S. 437 (1971) and the companion cases of *Lemon* v. *Kurtzman* and *Robinson* v. *DiCenso*, 403 U.S. 602 (1971).

Several principles can be drawn from these cases. First, if the end result of involvement between church and state would be "an excessive government entanglement with religion", it is violative of the First Amendment. *Walz* v. *Tax Commission, supra*, 397 U.S. at 674. Second, in each

case the court must decide whether the particular governmental act or activity in question would foster an "excessive entanglement" and must therefore be struck down or whether it would create only a "minimal and remote involvement" and may therefore be upheld. *Id.* at 670 & 676. If the involvement in question is "a continuing one calling for official and continuing surveillance", it is probably "excessive". *Id.* at 675. Third, governmental attempts to intrude upon, restrain, meddle in, monitor, interfere with, direct or control church affairs or religious activity or practice may constitute excessive entanglement. *Lemon* v. *Kurtzman, supra*; *Walz* v. *Tax Commission, supra.* Excessive entanglement may also be present in those instances where the involvement requires a "comprehensive, discriminating and continuing state surveillance" of religious activity, *Lemon* v. *Kurtzman, supra*, 403 U.S. at 619, or will ensnare the state in "details of administration", *Walz* v. *Tax Commission, supra,* 397 U.S. at 695 (Harlan, J., concurring), or will involve the government "in difficult classifications of what is or is not religious", *Gillette* v. *United States, supra*, 401 U.S. at 457, or include the post-audit power to inspect and evaluate church financial records, *Lemon* v. *Kurtzman, supra*, 403 U.S. at 620.

If the provisions of Title VII were construed to be applicable to the relationship between The Salvation Army and its Officers, the resulting involvement would inevitably lead to an excessive and continuing entanglement between church and state. The EEOC would be required to engage in a "comprehensive, discriminating, and continuing • • • surveillance" of The Salvation Army's employment policies, practices and records. The relationship thereby created would be "pregnant with dangers of excessive government direction" of The Salvation Army's relationship with

its Officers and thus would be violative of the First Amendment. *Lemon* v. *Kurtzman, supra,* 403 U.S. at 620.

Petitioner has alleged that female Salvation Army Officers receive less favorable assignments than their male counterparts. Surely this would be a "condition of employment" covered by Title VII and over which the EEOC would have jurisdiction. Yet how is the EEOC going to weigh the relative merits of one Officer's assignment with that of another's? How is the EEOC going to determine which Officer is most qualified to receive a given religious assignment in The Salvation Army? Because the relationship between a church and its ministers is one of those "matters at the very core of a religion" and thus protected from state infringement by the First Amendment, *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 450 (1969), only The Salvation Army can decide which Officer can best fulfill its particular religious and charitable mission in any given assignment at any given time and what compensation, benefits and allowances that Officer should receive. To permit the EEOC to make such decisions "in this highly sensitive constitutional area", *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963), is to install a censor over the church government and religious practices of The Salvation Army. This the First Amendment clearly forbids. *Cantwell* v. *Connecticut,* 310 U.S. 296, 305 (1940).

Implied in petitioner's argument is the contention that the application of Title VII to the church-minister relationship would involve only a small encroachment into this constitutionally protected area. But it was Madison who said: "[I]t is proper to take alarm at the first experiment on our liberties." Memorial and Remonstrance Against Religious Assessments, reprinted in the appendix to Jus-

tice Rutledge's dissenting opinion in *Everson* v. *Board of Education,* 330 U.S. 1, 65 (1947).

Thus it is clear that the Court of Appeals' decision was correctly decided not only on the basis of the Free Exercise Clause but on the basis of the entanglement test as well.

After determining that the application of Title VII to the church-minister relationship would be violative of the First Amendment (Pet. App. A. 24a-25a), the Court of Appeals was faced with the choice of declaring Title VII unconstitutional or of construing Title VII in such a manner as to avoid the constitutional infirmity. In choosing the latter course, the Court of Appeals held that "Congress did not intend, through the non-specific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister" (Pet. App. A. 25a), citing Mr. Justice Brandeis' concurring opinion in *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 341 (1936). In that opinion, Brandeis set forth seven "rules" used by this Court to avoid passing upon a constitutional question, the last of which is:

> "'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' *Crowell* v. *Benson,* 285 U.S. 22, 62." *Id.* at 348 (footnote omitted).

Petitioner asserts that the Court of Appeals "misapplied" the *Ashwander* rule of statutory construction because "there is no support in the legislative history for the court's strained construction" (Pet. 19 & 21). The fact of the matter is, of course, that Congress never considered this specific problem. As the Court of Appeals recognized in construing Section 702 of the Act (Pet. App. A. 18a), Congress clearly intended to protect non-minister employ-

ees of religious organizations against all but religious discrimination. But can it be said, as petitioner contends, that Congress actually intended Title VII to regulate the relationship between a church and its ministers as well?

This Court faced a similar construction problem in *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892). The issue involved in that case was whether an act of Congress making it unlawful for any person to assist or encourage the importation or migration of any "alien" or "foreigner" to perform "labor or service of any kind" in the United States was applicable to a church which had entered into a contract with an English minister who was to become its rector and pastor. While the act expressly excluded professional actors, artists, lecturers, singers and domestic servants, no exemption was provided for clergymen. The contract between the church and the minister was found to be within the letter of the statute because it contemplated that the minister would perform services within the United States. However, this Court held that Congress had not intended the act to apply to the contract in question, saying "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Id.* at 459. After stating that "no purpose of action against religion can be imputed to any legislation, state or national," *id.* at 465, this Court announced the following general rule of construction:

> "It is the case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed

> that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the Courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute." *Id.*

The Court of Appeals was understandably reluctant to attribute to Congress an intent which would necessarily render Title VII unconstitutional. Instead, the Court of Appeals chose to rely upon the "strong presumption that the law-making body has intended to act within, and not in excess of, its constitutional authority." *Plymouth Coal Co.* v. *Pennsylvania,* 232 U.S. 531, 546 (1914).

Since the Court of Appeals clearly reached the correct decision on each of the points discussed, there is no need for this Court to grant certiorari in this case.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Brief of Respondent in Opposition, the petition for a writ of certiorari should be denied.

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